



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4



IN THE MATTER OF:)
)
Water Protection, Inc.) Docket No. FIFRA-2000-04-0001
)
Respondent)
_____)

DEFAULT ORDER

This administrative proceeding for the assessment of a civil penalty was initiated by the Director of the Air, Pesticides, and Toxics Management Division of the Environmental Protection Agency (EPA) Region 4 (“Complainant”), pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. §§ 136 *et seq.* (hereinafter “FIFRA”), and the Consolidated Rules of Practice governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 64 Fed. Reg. 40138 (July 23, 1999). On January 5, 2000, Complainant filed an Administrative Complaint seeking a penalty of \$16,000 against Respondent. No answer having been filed in this matter, Complainant filed a Motion for Default Order on May 1, 2000. **This Order grants Complainant’s Motion for Default against Respondent and assesses the Respondent a civil penalty of \$16,000.**

Section 22.17(a) of the Consolidated Rules authorizes a finding of default “upon failure to timely answer a complaint”. 40 C.F.R. §22.15(a) requires an answer to the complaint within thirty (30) days after service. Default by respondent constitutes, for purposes of the pending proceeding, an admission of all facts alleged in the complaint and a waiver of respondent’s right to a hearing on such factual allegations. Section 22.17(c) of the Consolidated Rules, provides that when the Presiding Officer finds that default has occurred, a default order shall be issued against the defaulting party unless the record shows good cause why a default order should not be issued. The relief proposed in the complaint or the motion for default shall be ordered unless the record clearly demonstrates that the requested relief is inconsistent with the Act. This order shall constitute the initial decision under these Consolidated Rules of Practice.

FINDINGS OF FACT:

1. Respondent is Water Protection, Inc.
2. The Respondent produces, and at all relevant times produced, pesticides at the establishment located at 7960 NW 66th Street, Miami, Florida 33166.
3. The Respondent’s establishment Number is 047113-FL-001.

4. The Respondent was required to submit annual reports to EPA for 1995, 1997, and 1998, pursuant to Section 7 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136e.
5. The Respondent did not submit the annual reports to EPA for 1995, 1997, and 1998 by the required due dates of March 1, 1998, and March 1, 1999.
6. On January 5, 2000, Complainant issued a Civil Complaint and Notice of Opportunity for Hearing, Docket No. FIFRA-2000-04-0001, seeking a penalty of \$16,000 for violations set forth in Counts I, II and III of the Complaint.
7. In both the Complaint and the cover letter to the Complaint, Complainant informed Respondent that an answer must be filed within thirty (30) days of receipt of the Complaint and that failure to file an answer may result in entry of a Default Order imposing the proposed penalties without further proceedings.
8. The Complaint also referred Respondent to the Consolidated Rules of Practice governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, as amended, 40 C.F.R. Part 22.
9. Complainant served a copy of the Administrative Complaint upon Respondent on January 5, 1999, by certified mail, return receipt requested.
10. Service of the Administrative Complaint was completed as evidenced by the executed certified mail return receipt card.
11. Complainant filed the executed service receipt with the Regional Hearing Clerk on January 21, 2000.
12. As of this date Respondent has not filed an answer. (Exhibit D attached to Complainant's Motion for Default)
13. Respondent was made aware of the filing of the Motion for Default by service upon Carlos J. Gonzalez, President, Water Protection, Inc., on May 1, 2000, as indicated on the Certificate of Service signed by counsel for Complainant.
14. As of this date Respondent has not filed a response to Complainant's Motion for Default.

CONCLUSIONS OF LAW

1. Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
2. Respondent is a "producer" as defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3.

3. Section 12(a)(2)(L) of FIFRA, or 7 U.S.C. § 136j(a)(2)(L), states that a producer violating any provision of section 136e violates FIFRA.
4. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), requires a producer of any pesticide to register with EPA the establishment in which the pesticide is produced.
5. Section 7(c) of FIFRA, 7 U.S.C. § 136e(c), provides that a producer must submit to EPA information regarding the pesticides produces at a registered establishment. This information must be submitted to EPA “annually as required under such regulations as the Administrator may prescribe.” 7 U.S.C. 136e(c)(1), FIFRA § 7(c)(1).
6. The Administrator of EPA promulgated regulations pursuant to Section 7(c) of FIFRA in 40 C.F.R. Part 167, “Registration of Pesticide and Active Ingredient Producing Establishments, Submission of Pesticide Reports.”
7. 40 C.F.R. § 167.85 requires a producer of pesticide to submit reports to EPA. The pesticide report must be submitted annually to EPA on or by March 1 of each year. “[T]he producer must submit an annual report on or before March 1 of each year, even if the producer has produced no pesticidal product for that reporting year.” 40 C.F.R. § 167.85(d).
8. Respondent has been a producer of pesticides since at least October 25, 1995, and has had EPA Establishment Number 047113-FL001 since at least October 26, 1995.
9. As a producer of Pesticides, Respondent submitted an annual report to EPA for 1996.
10. As a producer of pesticides Respondent was required to submit to EPA annual reports for reporting years 1995, 1997, and 1998.
11. The annual report for 1995 was due to EPA on or before March 1, 1996. EPA did not receive the annual report for 1995 from Respondent by that date. The annual report for 1997 was due to EPA on or before March 1, 1998. EPA did not receive the annual report for 1997 from Respondent by that date. The annual report for 1998 was due to EPA on or before March 1, 1999. EPA did not receive the annual report for 1998 from Respondent by that date. (See Exhibit G attached to Complainant’s Motion for Default)
12. Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by not submitting the annual report for 1995 by March 1, 1996, as required by Section 7 of FIFRA, 7 U.S.C. § 136(e).
13. Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136(j)(a)(2)(L), by not submitting the annual report for 1997 by March 1, 1998, as required by Section 7 of FIFRA, 7 U.S.C. § 136e.
14. Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by not

submitting the annual report for 1998 by March 1, 1999, as required by Section 7 of FIFRA, 7 U.S.C. § 136e.

15. Respondent's failure to timely submit annual reports for three separate years constitutes three violations of FIFRA § 12(a)(2)(L).

16. The maximum penalty assessable for the violation of not submitting a report by or on March 1, 1996, is \$5,000. FIFRA § 14(a)(1), 7 U.S.C. § 136(a)(1).

17. The maximum penalty assessable for the violation of not submitting a report by or on March 1, 1998, is \$5,500. Table 1 of 40 C.F.R. § 19.4.

18. The maximum penalty assessable for the violation of not submitting a report by or on March 1, 1999, is \$5,500. Table 1 of 40 C.F.R. § 19.4.

19. 40 C.F.R. § 22.17(a) provides that "a party may be found in default (1)after motion, upon failure to file a timely answer to the complaint..."

20. 40 C.F.R. § 22.17(a) provides that for purposes of the pending action, default by a respondent constitutes "an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations".

21. Respondent is in default for purposes of the pending action for failing to file a timely answer. For purposes of the pending action, all facts alleged in the Complaint are admitted and Respondent has waived its right to a hearing on such factual allegations.

22. This Default Order is being issued in accordance with section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), which provides that when a Presiding Officer determines that a default has occurred, a Default Order shall be issued against the defaulting party unless the record shows good cause why such an order should not be issued. The record does not show good cause why a Default order should not be issued.

PENALTY DETERMINATION

1. According to Section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act."

2. Administrative civil penalties for violations of FIFRA must be assessed and collected pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136 l(a), which provides that in determining the amount of the penalty, the Administrator shall consider the appropriateness of the penalty to the size of the business of the person charged, the effect of the penalty on the person's ability to continue in business and the gravity of the violation.

3. The applicable civil penalty guideline is the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act dated July 2, 1990 (“ERP”). The following five step process is followed:

1) determination of gravity or “level” of the violation using Appendix A of the ERP; 2) determination of the size of business category for the violator; 3) use of the FIFRA civil penalty matrices found in Table 1 to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; 4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the “Gravity Adjustment Criteria” found in Appendix B; and 5) consideration of the effect that payment of the total civil penalty will have on the violator’s ability to continue in business, in accordance with the criteria established in the ERP.

4. 40 C.F.R. § 22.17(c), provides that “[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.”

5. In accordance with 40 C.F.R. § 22.17(c), I took into consideration all the factors set forth at Section 14(a) of FIFRA, 7 U.S.C. § 136 I(a)(4), as well as the factors set forth in the ERP.

6. Using Appendix A of the ERP to determine gravity level, Respondent’s violations fell into level 2.

7. As Complainant determined, the size of Respondent’s business fell into category “I” of Table 2 of the ERP, based upon the fact that Respondent had projected sales revenues of \$4,000,000. (See the Dun and Bradstreet report, attached as Exhibit I to Complainant’s Motion for Default)

8. Using Table 1 of the ERP to determine the base penalty, when the gravity level is 2 and the size of business is I, the dollar amount of the base penalty is \$5,000 for a violation occurring before January 30, 1997, and \$5,500 for FIFRA violations after January 30, 1997. As Complainant notes, in this case, two violations took place after January 30, 1997. The base penalty for each of these violations is \$5,500. The base penalty for the violation occurring before January 30, 1997 is \$5,000. The total base penalty in this case is \$16,000.

9. No reductions were made to base penalties for record keeping violations under the ERP, since the gravity or recordkeeping and reporting violations are already considered in the dollar amounts presented in the FIFRA civil penalty matrices. (ERP, p.22)

10. Without any evidence to the contrary, Complainant correctly made the assumption that the

Respondent has the ability to pay a \$16,000 penalty.

11. For the reasons set forth above, I find the proposed penalty is not inconsistent with the record of the proceeding or with FIFRA.

ORDER

Under the authority of Section 14 of FIFRA, 7 U.S.C. § 136l, and the Consolidated Rules, 40 C.F.R. § 22.17, **Respondent is found to be in default.**

Respondent is hereby **ordered** to pay a civil penalty of **Sixteen Thousand Dollars (\$16,000)**. This penalty shall become due and payable, without further proceedings, thirty (30) days after this Default Order becomes final, pursuant to 40 C.F.R. § 22.17(c). Payment shall be made by forwarding a money order, cashier's or certified check, in the amount of \$16,000 payable to Treasurer, United States of America to:

EPA Region 4
P.O. Lock Box 100142
Atlanta, Georgia 30384

Respondent shall note on the money order or check the title and docket number of this case. Respondent shall submit a copy of the check to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303

This **Default Order constitutes** an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Default Order shall become final within forty-five (45) days after its service upon the parties and without further proceedings, unless (1) a party appeals the Initial Decision to the Environmental Appeals Board, (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects to review the Initial Decision on its own initiative. 40 C.F.R. § 22.27(c). The procedures for appealing an Initial Decision are listed in the Consolidated Rules at 40 C.F.R. § 22.30.

If the civil penalty is not paid within the prescribed time period, interest will be assessed pursuant to Section 11 of the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3717, based on the present value of funds owed to the United States Treasury at the time the Final Order is issued, and such rate will remain in effect until full payment is received. A six (6%) percent per annum late payment penalty will also be applied on any principal amount not paid

within ninety (90) days of the due date.

Date: June 26, 2000

/S/
Susan B. Schub
Regional Judicial Officer